Before the

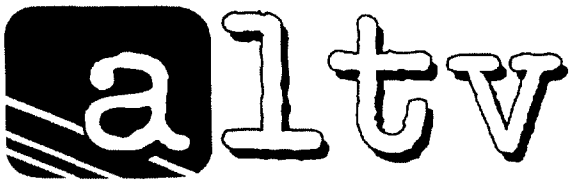
Federal Communications Commission

Washington, D.C. 20554

In the Matter Of:

Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

MM Docket No. 98-35



Comments to the Notice of Inquiry by the Association of Local Television Stations, Inc.

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Executive Summary

The UHF discount should be retained. The 1996 Telecommunications Act specifically amended 47 C.F.R. Section 73.3555 to increase the national audience reach for broadcast owners from 25 to 35 percent of the national audience. It did so with full understanding that pursuant to section 73.3555, UHF stations were attributed with only half the audience reach of their VHF counterparts. Any attempt to eliminate the discount would undermine the intent of the statute.

The technical and economic justification for the UHF discount remain. The laws of physics dictate that UHF signals have inferior propagation characteristics. When all factors are considered these stations have roughly half the coverage area of their VHF counterparts. It is still much more expensive to operate comparable facilities in the UHF band.

The UHF discount applies to analog UHF stations. Nevertheless, the advent of digital television will not eliminate the need for the UHF discount. Because the FCC had to squeeze in new DTV channels in the UHF band, the interference based limitations of UHF analog stations are greater today than they were when the discount was adopted in 1985. Also, the FCC's replication policies have retained the distinction between VHF and UHF facilities. VHF stations operating DTV facilities in the UHF band have been given larger coverage areas.

The growth of cable television has not closed the gap between UHF and VHF stations. Ratings data confirms that VHF stations have a significant advantage over their VHF counterparts. This continued disadvantage has significant economic consequences. Long term profitability data demonstrate that the profitability gap between UHF and VHF stations has not been reduced.

Eliminating the UHF discount now could force some large group owners to divest their interests. This would have a negative impact on the development of new networks and reduce national network competition.

The broadcast newspaper cross ownership rule should be eliminated. There has never been any evidence that these local combinations harmed the public. To the contrary, the FCC found that newspaper owned television stations excelled in locally oriented programming. The media market has changed dramatically since 1975. The rule is no longer justified.

The cable broadcast cross-ownership rule should be retained. Our concern is not that there is a lack of diversity in local markets. Rather, the rule should be retained because cable still occupies a gatekeeper position as owner of the video pipeline. As a competitor, cable has demonstrated a proclivity to discriminate against certain local stations with respect to carriage and channel positioning. This incentive would increase exponentially if a local station owned a cable system. Such discriminatory treatment would inure to the benefit of both the cable operator and the commonly owned local television station. While present must-carry rules

address this problem to some extent, local cable/broadcast combinations could still discriminate with respect to retransmission consent.

The anti-competitive potential of these combinations is most acute with respect to the roll out of digital television. To date, there are no must-carry rules for digital televison. A local television/cable combination could dramatically affect the digital roll out of its broadcast competitors by denying them carriage of their new digital stations. Accordingly, at the very least, the FCC should not eliminate this rule until the digital must-carry issues have been resolved.

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The Association of Local Television Stations Inc. (ALTV) hereby submits the following comments in the above captioned proceeding. ALTV has participated in various Commission proceedings regarding its television ownership rules. While the biennial review raises a number of issues, we will focus our comments on three major issues: 1) the UHF discount, 2) the television newspaper cross-ownership rule, and 3) the cable broadcast cross-ownership rules.

I. The UHF Discount Should Be Retained

A. The 1996 Telecommunications Act Compels Retention of the UHF Discount

Section 202 (c)(1) of the 1996 Telecommunications Act relaxed the national ownership rules by eliminating the 12 station numerical cap and increasing the audience reach limit from 25 to 35 percent of the national audience. There is no dispute that the 35 percent audience cap was designed to relax the FCC ownership limits. The statutory language is clear, "The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations ...by *increasing* the national audience reach limitation for television stations to 35 percent." Section 202(c)(1)(b). The conference agreement explains:

> Subsection 202(c)(1) directs the Commission to modify its multiple ownership rules to eliminate the number of television stations which may be owned or controlled nationally and to *increase* the national audience reach limitation for television stations to 35 percent. (*emphasis supplied*)

The plain language of both the statute and the conference agreement leads to two inescapable conclusions. First, the statute simply increased the audience reach cap that was embodied in 47 C.F.R.§ 73.3555. This obviously encompassed the then existing method of calculating the audience reach of a station, which included the UHF discount. In short, Congress presumed the continued existence of the UHF discount when it increased the audience reach cap to 35 percent. Second, both the conference agreement and the statutory language make it clear that any modification of 47 C.F.R. § 73.3555 should take the form of *increasing* the national audience reach cap.

Any attempt to eliminate the audience reach cap is simply contrary to the intent of the 1996 Telecommunications Act. As the *Notice* acknowledged, several group owners would exceed the cap if the discount were eliminated.[1] In fact, some of these owners would be forced to reduce their ownership below their 1996 levels. Congress never intended such a result. For entities that own a significant number of UHF facilities, a 35 percent cap without a UHF discount would be more restrictive than the old 25 percent cap with the UHF discount in place. The Commission should not alter Congressional intent by changing the method by which the audience reach cap is calculated. This proceeding should not be a back door to re-regulation.

B. The Justifications for the UHF Discount Remain

The UHF discount is based on the fact that the propagation characteristics of UHF signals are simply not as good as their VHF counterparts. While there have been significant changes in the video marketplace, the technical and economic justifications for the discount remain.

UHF stations have long occupied a unique position in the FCC's national ownership rules. The original seven station rule was designed to promote UHF investment by group owners in order to compensate for technical shortcomings. Under the old rule, a broadcaster could own seven television stations, but only five stations could be VHF facilities. This limitation would provide an incentive for large group owners to invest in UHF stations. Such action was deemed necessary because of their inferior position in the marketplace.

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[1] *Notice of Inquiry (Biennial Regulatory Review)* in MM Docket No. 98-35, FCC 98-37 (Released March 13, 1998) at para 27. See discussion, *infra,* at 27.

There was considerable debate surrounding UHF stations when the national multiple ownership rules were revised in 1984-1985. The original *Report & Order* adopted a transitional 12 station limit which would lead to a complete elimination of the rules in six years. Commissioner Dawson disagreed with this purely numerical approach, preferring a national multiple ownership rule predicated on audience reach. According to Commissioner Dawson's plan, group owners could own any combination of television stations reaching up to 30 percent of the nation's households. However, no more than 25 percent of this reach could be through VHF stations. She explained the distinction:

> I would maintain a revised VHF/UHF distinction, not only to encourage UHF ownership, but also as recognition of the business reality that, even though the gap has narrowed considerably, UHF continues to operate at a technical and economic disadvantage.[2]

Commissioner Rivera agreed, expressing concern about the FCC's failure to carry forward the UHF/VHF dichotomy.[3]

On reconsideration, the FCC dramatically altered its national ownership rules.[4] Importantly, it continued to distinguish between UHF and VHF facilities in the context of the national ownership rules. The key element was the enactment of both the 25 percent audience reach cap and the UHF discount. The audience reach cap and the UHF discount were inextricably linked. The Commission provided several justifications for the discount.

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[2]*Report & Order* in MM Docket No 83-1009, 100 FCC 2d at 17, 66-65 n. 4 (1984) (Dawson dissenting)

[3]*Id.* at 72-72 (Rivera concurring in part, dissenting in part)

[4]*Memorandum Opinion & Order* in MM Docket No. 83-1009, 100 FCC2d at 74 (1985)

While there had been demonstrable progress in the economic viability of UHF stations by 1984, the Commission still concluded that "the inherent physical limitations of the medium should be reflected in our national multiple ownership rules."[5] The UHF discount would not only continue to promote UHF television but also "reduce the possibility of erosion of the tremendous progress made by UHF television to date."[6]

Because the limitation of UHF television involved its ability to physically reach viewers, the FCC believed this concern should be expressed in the context of its audience reach rules. The FCC did not simply develop a strategy to increase the cap *per se.* Rather the key was to focus on the inherent limitations of UHF coverage. As a result, the Commission decided to attribute to UHF stations, an audience reach of only 50 percent of a market's audience reach. According to the FCC, if the New York market comprised 7.72 percent of all television households, a UHF station in that market would be attributed with a reach of 3.86 percentage points.[7]

It is important to recognize that most of the factors, such as the All Channel Receiver Act, which purportedly closed the gap between UHF and VHF facilities were already in place when the FCC established the UHF discount in 1985. At the time, the FCC knew that some progress towards comparability had been made. Even with this progress, the FCC concluded:

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[5] *Id.* at 93.

[6] *Id.* at 93

[7] *Id.* At 93.

> On reconsideration, we find that while there has been demonstrable progress in the viability of UHF television, the inherent physical limitations of this medium should be reflected in our national multiple ownership rules.[8]

The Commission recognized that while progress had been made, the laws of physics results in less coverage for UHF stations. The Commission then cited the final report of the 1980 UHF Comparability Task Force:

> Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength.[9]

While there has been some closure of the gap between UHF and VHF facilities, the physical coverage limitations recognized by the Commission in 1985 have not changed. Nevertheless, the FCC has refined many of the policies affecting UHF facilities. For example, in 1988 the Commission eliminated its UHF Impact Policy. That policy however, was directed at preventing additional VHF allocations in markets with existing UHF facilities.

> In view of the above, we find that the UHF service has achieved a degree of comparability with the VHF service that obviates the necessity for continued retention of the UHF impact policy. Indeed, continued consideration of UHF impact issues would likely produce negative effects on the public interest by hindering the introduction of new VHF service. Accordingly we will no longer

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[8] *Memorandum Opinion and Order, National Multiple Ownership Rules* 100 FCC2d 74, 93(1985).

[9] *Memorandum Opinion and Order, National Multiple Ownership Rules* 100 FCC2d at 93 *citing, Comparability for UHF Television: Final Report* September 1980 at 2; *See also* Report and Order in Gen Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982).

> consider the impact on existing or potential UHF stations of individual cases involving allotment or allocation of new or expanded VHF service.[10]

Significantly, the FCC did not find that UHF and VHF facilities were comparable in terms of audience reach. The decision is confined to the issue of permitting new VHF facilities in markets where there are existing UHF stations. Unlike the old UHF Impact Policy Statement, the UHF discount was not designed for and does not operate to prevent new, additional competition. To the contrary, as will be discussed, *infra*, the UHF discount is pro competitive.[11] The decision regarding the UHF Impact Policy has no bearing on the policies that underlie the television ownership rules.

More recent decisions concerning UHF comparability are equally inapposite. These policies have dealt with specific network programming policies, not UHF station ownership.[12] For example, the FCC's decision to ignore the UHF/VHF distinction in the context of the

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[10]*Report and Order, Policies Regarding Detrimental Effect of Proposed New Broadcast Stations on Existing Stations*, MM Docket No. 87-69, 64 RR2d 583, 590(1988)f

[11]*See infra* at 28.

[12]Accordingly, the FCC's decision not to apply a UHF handicap in the context of the Prime Time Access rule is inapposite. In that the proceeding the FCC found that making a UHF/VHF distinction did not correlate with the network versus non-network application of the Prime Time Access rule. As the FCC noted:

> The [PTAR] rule does not and cannot address the technical disparities that still exist between some stations. Moreover, the rule has never been tailored to the UHF/VHF distinction. Rather, PTAR provides a competitive advantage to independent stations by limiting the programming options available to Top 50 market Affiliates, even in cases where the affected network affiliates are themselves UHF stations.

Report and Order Prime Time Access Rule, 11 FCC Rcd 546, 586. (1995).

secondary affiliation rule, does not mean that UHF should not be considered in the context of our ownership rules.[13]

The key is whether these justifications remain in the context of the FCC's ownership rules. ALTV believes that the justifications for the UHF discount are even more important in today's environment than they were in 1985.

1. Physical Limitations on UHF Television Remain

The UHF discount is a regulatory expression of the limitations that have been placed on television stations operating in the UHF band. The limitations in turn are a direct result of the FCC's analog allocation plan which created very strong stations in the VHF band during the 1940s. While all television stations were scheduled to move to the UHF band, the final 1952 allocation plan included both VHF and UHF television assignments.

The limitations imposed on the UHF band are a matter of physics that do not change with the passage of time. This handicap was discussed in detail in the FCC's *1980 Network Inquiry*. The Network Inquiry staff examined the actual Grade B contours of VHF and UHF stations and found that VHF station have nearly double the amount of coverage.

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[13]*See .e.g., Report and Order in Secondary Affiliation Rule*, MM Docket No. 91-221, 77 RR2d 453, 458- 459. (1995)

Modified Garde B Outdoor Contour Line Radius[14]

Channels	Radius
Low VHF (2-6)	**76 miles**
High VHF (7-13)	**72 miles**
UHF (14-69)	**45 miles**

Indeed if one were to examine the percent of geographic area receiving coverage and the distance from the transmitter, VHF stations have nearly twice the coverage area as their UHF counterparts.[15]

The coverage limitations translate into increased costs and reduced economic performance. While UHF analog stations, in theory, have been allocated greater power than their VHF counterparts, it takes significantly more power to transmit a UHF signal.

> Thus, UHF transmission at the maximum authorized ERP requires 10 times more electrical power than is required for low VHF transmission at maximum authorized ERP (100 KW). However, the cost differential is, in reality, much greater since low VHF amplifiers are much more efficient than UHF amplifiers. As a result, UHF transmission may require 20-50 times more electrical power than low VHF stations operating at full power. When total operating costs (including annualized capital equipment costs) are considered, a full power UHF transmitter is over eight times more expensive to operate than a full-power VHF transmitter.[16]

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[14]Network Inquiry Special Staff, Federal Communications Commission, New Television Networks: Entry Jurisdiction Ownership and Regulation, Vol 1. at 70.

[15]*Id* .t 71.

[16]*Id.*at 72.

As a result, UHF stations have historically operated at less than full effective radiated power (ERP). This means that the coverage areas of UHF stations are often significantly less than the coverage areas of VHF stations.

Apart from the signal coverage area, UHF stations have been subject to a number of other interference problems. The so called UHF "taboos" and receiver noise problems are well known. While television receivers have generally improved, interference problems remain and may get worse.

2. The New DTV Allocations Will Further Constrict Analog UHF Broadcasters

Some assert that the advent of digital television may eliminate the need for the UHF discount. They argue that since all DTV stations will be operating in the UHF band, all over-the-air broadcast facilities will be equal. Precisely the opposite is true. Because of the new DTV allocations, the case for the UHF discount is more compelling today than it was in 1985. This will remain so at least through the digital transition.

a) The UHF Discount is an Analog Based Rule

At the outset it should be observed that the UHF discount applies to *analog* UHF facilities. At the very least, there is no justification for eliminating the discount during the DTV transition period, because most of the audience will continue to watch broadcast television on analog television sets. In this regard, the coverage problems experienced by analog UHF facilities will increase during the transition, potentially reducing coverage. Even when the

transition to digital is complete, the current disparities between UHF and VHF stations will remain in the digital world.

b) DTV Interference to Existing UHF Analog Stations May Reduce Coverage

As noted above, the UHF discount was predicated on the technical limitations of the UHF signal. The technical limitations, hence off-air audience reach, of existing UHF analog stations will become greater during the transition period to DTV.

The interference problems associated with UHF analog television can be expected to become more severe over the next few years. The overwhelming majority of new DTV stations have been squeezed into the UHF band. In assigning these new stations the FCC has had to balance the interests of giving new DTV stations sufficient power to become commercially viable while at the same time insuring that the new DTV stations did not destroy existing analog UHF service.

The issue for the FCC was to balance interference concerns. This balance was described in the FCC's *Sixth Report and Order:*

> It is important to protect the existing NTSC service in designing the DTV Table so that the public does not lose television service during the transition. At the same time we believe it is equally important to avoid interference to new DTV stations wherever possible in order to provide for the best possible DTV service in the future. We therefore have attempted to minimize interference to all stations and to balance unavoidable interference between both NTSC and DTV stations equally in developing the DTV Table of Allotments.[17]

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[17] *Sixth Report And Order*, DTV Table of Allotments, 12 FCC Rcd 14588, 14629 (1997)

Nonetheless, the FCC as a matter of necessity has increased the levels of interference to existing analog UHF stations.

> In most instances the choice of channels for a DTV allotment will involve consideration of other nearby DTV allotments and existing NTSC stations. We noted that any plan that provides all eligible broadcasters with a new DTV allotment will unavoidably result in some degree of interference to both NTSC and DTV stations.[18]

Significantly, when determining the interference parameters of the DTV Table of Allotments, the FCC specifically reduced the interference free service area of existing UHF NTSC stations. Rather than protecting existing analog UHF stations to their predicted Grade B contours, the FCC stated that:

> The service area of an individual NTSC station is defined as the area *within the station's Grade B service contour, reduced by interference;* and is computed based upon the actual transmitter location, power and antenna height.[19]

Thus, in order to balanced the needs of new DTV channels, the interference levels experienced by existing UHF stations will higher than the levels that existed in 1985. Indeed, the *Sixth Report and Order* acknowledged, that 98 to 99 percentof all NTSC stations will receive less than 10 percent new interference (in terms of both area and population) from DTV operations.[20] It is important to remember however, that this 10 percent figure is based on the *new*, more limited definition of a UHF station's protected service area. Thus the actual level of

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[18]*Sixth Report And Order*, DTV Table of Allotments, 12 FCC Rcd 14588, 14628 (1997)

[19]*Id.* at 15678

[20]*Id.* at 14681-14682.

potential increased interference is much greater now than it was in 1985 when the UHF discount was established.[21]

On reconsideration the FCC increased the possibility that existing UHF stations may suffer reduced coverage because of potential interference. In an attempt to help alleviate some of the power disparity problems with UHF station assignments, the Commission adopted a new standard of *de minimis* interference. Under this standard a UHF analog station could potentially receive up to two percent additional interference.[22]

In summary, the advent of digital television will simply exacerbate the technical interference problems facing UHF analog stations. Moreover, as noted above, many analog UHF stations do not operate at maximum power or facilities because of the costs that are involved. In 1985, however, UHF stations had the option of increasing their power and/or antenna height to operate at maximum facilities if they so desired. This is no longer the case. In

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[21]The irony here is that much of the new interference is due to digital UHF assignments that have been paired with VHF stations. Thus in order to help VHF stations shift to digital television, the FCC has effectively widened the competitive gap between VHF and UHF facilities.

Importantly, we are not asking for review the FCC's DTV decisions. In many respects they are the proper balancing of conflicting interests. Indeed, ALTV urged the FCC to increase DTV power, which may increase interference to existing UHF facilities. This trade off was necessary to help make the new service competitive. Nonetheless, the FCC must acknowledge the impact these decisions have had on the technical aspects of the existing UHF *analog* service. There are simply more technical and interference based limitations today than existed when the FCC adopted the UHF discount in 1985.

[22]*Memorandum Opinion & Order* in MM Docket No. 87-268, FCC 98-24 (released February 23, 1998) at para. 79. Again, ALTV does not object to this result. The FCC needed to make accommodations to help solve the UHF power disparity. Nonetheless, its impact on interference and reduced coverage to existing UHF stations should be recognized.

order to make room for DTV, UHF NTSC upgrades may be denied if they interfere with new DTV allotments. Many analog UHF stations are locked into operating at their existing facilities. As a result, the coverage, hence audience reach, of these facilities is confined and cannot be increased.

To the extent the UHF discount was based on coverage and reception problems, it would appear that a more compelling case can be made for the discount today than in 1985. There is no doubt that interference levels will reduce analog UHF coverage at the outer edges of their protected contours. Even within their protected contours, UHF analog stations may face additional interference from a variety of elements, including adjacent channels.

c) New Digital Channel Assignments Will Not Increase UHF Reach

The UHF discount involved the audience reach characteristics of UHF *analog* stations. The assignment of a DTV channel to an existing analog station does not undermine the justification for the UHF discount. Indeed, the FCC should retain the discount during and after the transition to digital. There are numerous justifications for this policy.

First, in the early stages of the roll out there will be relatively few digital television receivers in the hands of consumers. The audience reach impact will be negligible, at best. To the contrary, shifting to digital will require the investment of significant amounts of capital. A difficult task for many UHF stations.

Second, the business focus during the digital transition will be to help viewers migrate from the a station's analog signal to its digital signal. Any increase in the audience share of the

digital station will be associated with a concomitant decline in the number of analog viewers. This is especially true given the FCC's phased in simulcasting requirements.

Third, the UHF vs. VHF disparity is even greater in the DTV world, because the protected contours of some UHF digital stations have become smaller. In the analog world, UHF stations had the ability, at least in theory, to broadcast at very high power levels. In fact in an attempt to equalize the potential Grade B coverage, analog UHF stations could operate at an ERP of 5000 Kw, a level far in excess of their analog VHF brethren.[23] Not so in the digital world. The UHF paired DTV assignments are designed to replicate the UHF analog station's *actual* coverage area, which is generally much smaller than the *potential* coverage area permitted by the FCC rules. As a result, the legally protected contours of UHF paired digital channels cover a smaller area than the protected contours of their UHF analog stations in 1985.

Fourth, contrary to the belief that all stations will be equal in the DTV world, the coverage disparities that exist between VHF and UHF analog stations in today's world will continue. The FCC's basic "replication principle" means that a UHF digital channel essentially replicate the coverage area of their "paired" UHF analog facility (U/U). The same is true for UHF digital channels that try to match the coverage area of their paired VHF analog channel (V/Us). To replicate the coverage of the analog VHF channel, some V/U digital stations have been given 20 times the power of a U/U DTV facility. At the very least the disparity will exist throughout the transition period. Today's actual power and coverage disparity between VHF and UHF stations is now firmly established as the legal limit in the digital world.

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[23]47 C.F.R. §73.614, *See also*, Network Inquiry Staff, *New Networks: Entry Jurisdiction, Ownership and Regulation*, Vol I at 72 (1980).

Thus, even if all DTV stations remain in the UHF band, the replication principle accepted by the FCC has created two classes of UHF DTV stations. The discount afforded to present day UHF analog stations should be extended to that class of U/U DTV facilities that were assigned lower power and a smaller coverage area.

Fifth, the FCC's decision to help with the power levels of the U/U stations does not eliminate this problem. ALTV's plan to permit increases in power by using tilt beam antennas presumes that the coverage area of the U/U digital station will not increase. The coverage disparity between V/U and U/U digital stations remains. Also, the FCC has limited overall power increases for U/U stations during this period to 200Kw. This amount is well below many V/U facilities which have been authorized to operate at 1000 Kw. Moreover, any increase in overall power will increase potential interference with existing UHF analog stations, thereby exacerbating the UHF analog handicap.

Sixth, the FCC's most recent DTV decision will permit the operation of digital television on VHF facilities. Thus, VHF stations assigned transitional UHF DTV channels will have the ability to shift digital operations back to VHF channels. As a result, the VHF vs. UHF disparity will once again appear in television broadcasting. For those stations broadcasting DTV in the UHF band, the costs will be higher and coverage reduced.

Seventh, because of the FCC's decision to create a core channel allotment for DTV, some UHF stations may be required to move twice. These stations will clearly suffer a significant handicap over the next several years.

Eighth, to the extent the *Notice* found cable carriage to be relevant to the UHF discount, there is no guarantee of cable carriage for digital television stations. The digital must-carry issue is now before the FCC and hopefully will be decided in short order.[24]

Ninth, over-the-air reception of digital television stations is still uncertain. Recent preliminary studies conducted by Wallace and Associates documented tremendous difficulties with over-the-air reception of digital stations. This applies to both indoor and outdoor antenna reception. The key problem is multi-path interference of the digital signal. While multi-path interference may be ultimately resolved, it demonstrates that new UHF DTV stations may not increase the reach of a station, especially during the transition period.

Finally, even if digital stations become fully operational on an accelerated basis, owning both a digital and analog station in the same market will not increase a station's audience reach. The number of television households remains static. Additional stations will merely further fragment the same audience. The pie remains the same size, the pieces will just be smaller. From a regulatory perspective, however, the audience reach of each individual UHF facility will not expand. To the contrary, the station will have to fight to keep the same size audience it currently has today.

3. Cable Television Has Not Expanded A UHF Television Stations Reach

The *Notice* observed that an important element in considering the UHF discount is the growth of cable television. Some argue that cable television has extended the reach of UHF

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[24]*Notice of Proposed Rule Making* in CS Docket No. 98-120, FCC 98-153 (released July 10, 1998).

analog stations, thereby eliminating the need for the UHF discount. This analysis is simply incorrect. To the contrary, cable carriage has not necessarily increased the audience reach of local UHF television stations.

First, despite the must-carry provisions of the 1992 Cable Act, many smaller UHF stations are *not* carried throughout their local market. The 1992 Cable Act contains several must-carry waivers, which relieve cable systems of the obligation to carry a local television station.[25] On numerous occasions, cable systems have employed these waiver provisions to avoid carrying local television stations. Moreover, in order to qualify for carriage under the 1992 Cable Act, a UHF station must provide a Grade B quality signal to the cable system's headend. As noted above, in most instances the Grade B of a UHF facility does not extend as far as the Grade B contour of a VHF facility. As a result UHF analog stations will be carried on fewer cable systems than a VHF station because their Grade B signal encompasses a smaller geographic area.

Second, eliminating the UHF discount because of cable carriage is inconsistent with FCC policy. In the context of its local ownership rules, the FCC has argued that the governments primary concern is with over-the-air reception. It is argued that government policy must be directed towards those who do not subscribe to cable, but rely solely on over-the-air television signals.

Assuming, *arguendo,* that this position is correct, it would be incongruous for the FCC to eliminate the UHF discount because cable carriage has purportedly extended the technical reach of some stations or improved reception problems for others. According to the FCC's

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[25]See 47 C.F.R. 76.59. *See e.g. Dynamic Cablevision of Florida*, Ltd 8 CR 1172 (1997)

logic, the availability of cable should not be considered in its television broadcasting diversity analysis. In short, the FCC cannot have it both ways. It cannot claim that cable is irrelevant as a consideration in the local ownership rules and at the same time argue that cable carriage has eliminated the need for the UHF discount. To this end the FCC has already found that its policy concerns with UHF stations are not obviated by cable carriage. The disparity remains for non-cable subscribers.

> Nonetheless, the disparity between UHF and VHF remain for a portion of the now approximately one third of viewers that do not subscribe to cable.[26]

4. Cable Carriage Has Not Closed the Economic Gap Between VHF and UHF Stations.

Some may argue that cable carriage has increased the reach of UHF stations to the point where there is no distinction between UHF and VHF facilities. We disagree. Factoring cable carriage into the mix leads to the inescapable conclusion that cable has not closed the gap between UHF and VHF facilities.

At the outset it is worth remembering that in 1985 there were 6,200 cable systems serving 29 million subscribers.[27] While that number has more than doubled today (10,845 systems serving 64.1 million subscribers), it is important to recognize that the UHF discount has never been contingent on cable carriage. UHF stations were considered to reach a smaller audience even though they may have been carried on cable systems. In this regard, it is worth

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[26] *Report and Order, Prime Time Access Rule*, 11 FCC Rcd at 584.

[27] *1998 Television & Cable Factbook*, Cable Vol No. 66 at F-1.

remembering that must-carry was in effect when the UHF discount was created. Whether a UHF station was carried or not carried was irrelevant to its qualification for a discount.

Second, while arguably extending the potential reach of a UHF station in theory, cable has not necessarily increased the audience share of the station. To be sure, without cable carriage local television stations, especially UHF stations, would not survive. However, in terms of assessing the relative strength between UHF and VHF stations, cable has not "closed the gap" between the two types of facilities. Yet it is the relative difference in the reach and strength of these stations that led the FCC to initially adopt the UHF discount. To the extent cable has not played a major factor in closing this gap, then the justification for the discount remains. The impact of cable on UHF reach can be measured in many ways.

Ratings Studies

It can be difficult to assess the affect of the UHF handicap because in most cases different programming appears on various UHF and VHF stations. For example, the major networks often have VHF affiliates while emerging networks generally have UHF affiliates. Nonetheless, studies which have examined various markets and controlled for the programming appearing on those stations demonstrate that UHF facilities continue to suffer from a significant handicap even when cable carriage is considered.

For example, the UHF handicap is readily apparent in terms of the ratings one can achieve with UHF vs. VHF facilities. In 1995, ALTV submitted a study to the FCC which included a specific analysis documenting the ratings handicap associated with Fox Network

programming on UHF stations[28]. Using regression analysis, the study matched programs and time slots and the relevant factors other than UHF status. The empirical test of the UHF ratings handicap was based on the ratings for the same Fox programs, in the same time slots, across 75 cities, during 1993. The Arbitron ratings data compared viewing on UHF channels and VHF channels. Differences in other factors, such as income, and city size, were taken into account, so a UHF vs. VHF comparisons could be made.

Programs were matched in the 8:00 to 8:30 and the 8:30 - 9:00 p.m. time periods for the Eastern and Pacific Time zones and the 7:00-7:30 and 7:30-8:00 p.m. time periods for the Central and Mountain Time zones for Monday through Friday. The results are listed in Table 1.

Table 1.
UHF Ratings Handicap
Fox Affiliated Stations

	First Half Hour	UHF Ratings Disadvantage	Second Half Hour	UHF Ratings Disadvantage
Monday	Fox Night at the Movies	1.38	Fox Night at the Movies	1.09
Tuesday	Roc	1.32	Roc	1.34
Wednesday	Bev. Hills 90210	3.89	Bev. Hills 90210	4.05
Thursday	The Simpsons	2.21	The Simpsons	1.20
Friday	Brisco Cty. Jr.	2.15	Brisco Cty. Jr.	1.99
Average UHF Disadvantage Monday through Friday	2.09			

[28] *See* Clifton, James et al. *Economic Report, The Economic Effects of Repealing the Prime Time Access Rule, submitted* in MM Docket No. 94-123, March 1995 at 41- 44. Significantly, while the FCC ultimately repealed the Prime Time Access Rule, neither the FCC nor opposing parties in that proceeding challenged the specific findings in this part of the Economic Report. The relevant portions of the study are attached as Exhibit A.